

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

GLORIA ONTIVEROS, ) No. CV 10-4215-PLA  
Plaintiff, )  
v. ) **MEMORANDUM OPINION AND ORDER**  
MICHAEL J. ASTRUE, )  
COMMISSIONER OF SOCIAL )  
SECURITY ADMINISTRATION, )  
Defendant. )

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I.

PROCEEDINGS

Plaintiff filed this action on June 15, 2010, seeking review of the Commissioner's denial of her application for Supplemental Security Income payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on June 25, 2010, and July 8, 2010. Pursuant to the Court's Order, the parties filed a Joint Stipulation on February 3, 2011, that addresses their positions concerning the disputed issues in the case. The Court has taken the Joint Stipulation under submission without oral argument.

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1                   **II.**2                   **BACKGROUND**

3                   Plaintiff was born on July 10, 1963. [Administrative Record (“AR”) at 32, 55.] She has a  
 4 tenth grade education [AR at 32, 108], and has past relevant work experience as a dental  
 5 assistant and receptionist. [AR at 16, 33, 104, 110.]

6                   On February 23, 2006, plaintiff filed her application for Supplemental Security Income  
 7 payments, alleging that she has been disabled since January 1, 2001,<sup>1</sup> due to, among other  
 8 things, depression, schizophrenia, hepatitis C, asthma, and muscle spasms. [AR at 9, 29, 55, 93-  
 9 97, 102-09.] After her application was denied initially and on reconsideration, plaintiff requested  
 10 a hearing before an Administrative Law Judge (“ALJ”). [AR at 57-68.] A hearing was held on  
 11 October 14, 2008, at which time plaintiff appeared with counsel and testified on her own behalf.  
 12 A vocational expert also testified.<sup>2</sup> [AR at 26-54.] On November 3, 2008, the ALJ determined that  
 13 plaintiff was not disabled. [AR at 6-18.] When the Appeals Council denied plaintiff’s request for  
 14 review of the hearing decision on April 23, 2010, the ALJ’s decision became the final decision of  
 15 the Commissioner. [AR at 1-4.] This action followed.

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17                   **III.**18                   **STANDARD OF REVIEW**

19                   Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s  
 20 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial  
 21 evidence or if it is based upon the application of improper legal standards. Moncada v. Chater,  
 22 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

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23                   <sup>1</sup> Plaintiff initially alleged a disability onset date of January 1, 2001, but amended the onset  
 24 date to December 20, 2004, during the October 14, 2008, administrative hearing. [See AR at 9,  
 25 29, 97.]

26                   <sup>2</sup> During the October 14, 2008, administrative hearing, plaintiff requested that her prior  
 27 application for Supplemental Security Income payments, filed on July 20, 2004, be reopened.  
 [See AR at 9, 29-30.] In the November 3, 2008, hearing decision, the ALJ declined to do so.  
 [See AR at 9.] As plaintiff does not challenge the ALJ’s decision not to reopen her July 20, 2004,  
 28 application, the Court does not address herein that aspect of the ALJ’s decision.

1       In this context, the term “substantial evidence” means “more than a mere scintilla but less  
 2 than a preponderance -- it is such relevant evidence that a reasonable mind might accept as  
 3 adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at  
 4 1257. When determining whether substantial evidence exists to support the Commissioner’s  
 5 decision, the Court examines the administrative record as a whole, considering adverse as well  
 6 as supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th  
 7 Cir. 1989). Where the evidence is susceptible to more than one rational interpretation, the Court  
 8 must defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala,  
 9 53 F.3d 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

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11                          IV.

12                          **THE EVALUATION OF DISABILITY**

13       Persons are “disabled” for purposes of receiving Social Security benefits if they are unable  
 14 to engage in any substantial gainful activity owing to a physical or mental impairment that is  
 15 expected to result in death or which has lasted or is expected to last for a continuous period of at  
 16 least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

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18                          **A. THE FIVE-STEP EVALUATION PROCESS**

19       The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing  
 20 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,  
 21 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must  
 22 determine whether the claimant is currently engaged in substantial gainful activity; if so, the  
 23 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in  
 24 substantial gainful activity, the second step requires the Commissioner to determine whether the  
 25 claimant has a “severe” impairment or combination of impairments significantly limiting her ability  
 26 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.  
 27 If the claimant has a “severe” impairment or combination of impairments, the third step requires  
 28 the Commissioner to determine whether the impairment or combination of impairments meets or

1 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404,  
 2 Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id.  
 3 If the claimant’s impairment or combination of impairments does not meet or equal an impairment  
 4 in the Listing, the fourth step requires the Commissioner to determine whether the claimant has  
 5 sufficient “residual functional capacity” to perform her past work; if so, the claimant is not disabled  
 6 and the claim is denied. Id. The claimant has the burden of proving that she is unable to  
 7 perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a  
 8 prima facie case of disability is established. The Commissioner then bears the burden of  
 9 establishing that the claimant is not disabled, because she can perform other substantial gainful  
 10 work available in the national economy. The determination of this issue comprises the fifth and  
 11 final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828  
 12 n.5; Drouin, 966 F.2d at 1257.

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#### 14 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

15 In this case, at step one, the ALJ found that plaintiff had not engaged in any substantial  
 16 gainful activity since December 20, 2004, the amended onset date of disability. [AR at 11.] At  
 17 step two, the ALJ concluded that plaintiff has the following impairments that, in combination, are  
 18 severe: asthma; hepatitis C; borderline intellectual functioning; depressive disorder, not otherwise  
 19 specified; and a history of polysubstance dependence with marijuana, alcohol, and  
 20 methamphetamine, in remission. [AR at 11-12.] At step three, the ALJ determined that plaintiff’s  
 21 impairments do not meet or equal any of the impairments in the Listing. [AR at 12.] The ALJ  
 22 further found that plaintiff retained the residual functional capacity (“RFC”)<sup>3</sup> “to perform a full range  
 23 of work at all exertional levels,” but that she is limited to working in environments without dust,  
 24 gases, fumes or odors, and has the following nonexertional limitations: “[plaintiff] is limited to  
 25 simple, routine, repetitive mental work tasks; to frequent use of independent judgment; and to

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27 <sup>3</sup> RFC is what a claimant can still do despite existing exertional and nonexertional limitations.  
 28 Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

frequent contact with co-workers, supervisors, and general public. [Plaintiff] is also limited to low stress mental work tasks, that is, on a scale of '1 to 10', '10' being, by example, the work of an air traffic controller and '1' being, by example, the work of a night dishwasher. She is limited [to] work tasks on the stress level of '2 to 3.' [AR at 13, 15.] At step four, the ALJ concluded that plaintiff is unable to perform her past relevant work. [AR at 16.] At step five, the ALJ concluded that "there are jobs that exist in significant numbers in the national economy that [plaintiff] can perform." Accordingly, the ALJ found plaintiff not disabled. [AR at 16-17.]

Y.

## THE ALJ'S DECISION

Plaintiff contends that the ALJ failed to properly: (1) consider the consultative examiner's opinion; (2) determine whether plaintiff's impairments meet or equal the Listing; (3) determine plaintiff's RFC; and (4) pose a complete hypothetical to the vocational expert. [Joint Stipulation ("JS") at 2-3.] As set forth below, the Court agrees with plaintiff and remands the matter for further proceedings.

## A. THE LISTING

Plaintiff asserts that the ALJ failed to properly consider whether plaintiff's impairments meet or equal § 12.05C of the Listing. [JS at 6-9.]

To make a proper step-three finding, “[a]n ALJ must evaluate the relevant evidence before concluding that a claimant’s impairments do not meet or equal a listed impairment. A boilerplate finding is insufficient to support a conclusion that a claimant’s impairment does not do so.” Lewis v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001) (citing Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990)). “The regulations … require the Secretary to review the symptoms, and make specific findings essential to the conclusion. … [The ALJ’s] findings should be as comprehensive and analytical as feasible and, where appropriate, should include a statement of subordinate factual foundations on which the ultimate factual conclusions are based, so that a reviewing court may know the basis for the decision.” Gonzalez v. Sullivan, 914 F.2d 1197, 1200 (9th Cir. 1990)

1 (quotations and citations omitted); see 20 C.F.R. §§ 404.1526(c), 416.926(c) ("When we  
2 determine if your impairment medically equals a listing, we consider all evidence in your case  
3 record about your impairment(s) and its effects on you that is relevant to this finding."). If a  
4 claimant has an impairment or combination of impairments that meet(s) or equal(s) a condition  
5 outlined in the Listing, then the claimant is presumed disabled at step three of the evaluation  
6 process, and the ALJ need not make any specific findings as to her ability to perform her past  
7 relevant work or any other jobs. See 20 C.F.R. §§ 404.1520(d), 416.920(d); Lester, 81 F.3d at  
8 828.

9 To meet § 12.05 of the Listing, a claimant must demonstrate that her impairment "satisfies  
10 the diagnostic description in the introductory paragraph [of § 12.05] and any one of the four sets  
11 of criteria" in paragraphs A, B, C, or D of § 12.05. 20 C.F.R., Pt. 404, Subpt. P, App. 1, §  
12 12.00(A). The introductory paragraph to § 12.05 states: "Mental retardation refers to significantly  
13 subaverage general intellectual functioning with deficits in adaptive functioning initially manifested  
14 during the developmental period; i.e., the evidence demonstrates or supports onset of the  
15 impairment before age 22. [¶] The required level of severity for this disorder is met when the  
16 requirements in A, B, C, or D are satisfied." 20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.05. To  
17 satisfy the requirements of § 12.05C, a claimant must show that she has "[a] valid verbal,  
18 performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing  
19 an additional and significant work-related limitation of function." Id. When a claimant has different  
20 IQ scores for her verbal, performance, or full scale IQ, the lowest score is used to evaluate if the  
21 claimant meets or equals § 12.05 of the Listing. 20 C.F.R., Pt. 404, Subpt. P, App. 1, §  
22 12.00(D)(6)(c).

23 On October 17, 2006, consultative examining psychologist Dr. Margaret A. Donohue  
24 completed a Complete Psychological Evaluation that included, among other things, a mental  
25 status examination (revealing that plaintiff "put[] forth an adequate effort"; her mood and affect  
26 showed signs of depression and anxiety; she had poor attention, concentration, judgment, and  
27 insight; and she had a low general fund of information) and a Wechsler Adult Intelligence Scale -  
28 Third Edition ("WAIS - Third Edition") (revealing that plaintiff has a verbal IQ of 66, a performance

1 IQ of 68, and a full scale IQ of 64). [See AR at 212-16.] Dr. Donohue diagnosed plaintiff as  
 2 having “[p]olysubstance dependence with marijuana, alcohol, and methamphetamine,” noting that  
 3 plaintiff reported not using for three or four months prior to the Evaluation; “[m]ildly impaired  
 4 intellectual ability and borderline memory functioning,” noting that plaintiff “comes across as being  
 5 in the low average range of intelligence on clinical presentation”; and hepatitis C, Bell’s palsy, and  
 6 asthma (per plaintiff’s report). [AR at 215.] Dr. Donohue opined that plaintiff “is capable of doing  
 7 simple and detailed tasks but does them slowly,” and that “[i]nformation needs to be repeated” to  
 8 her. [Id.]

9 In the decision, the ALJ summarized the findings expressed in Dr. Donohue’s October 17,  
 10 2006, Evaluation, including that plaintiff put forth an adequate effort; showed signs of anxiety and  
 11 depression; had poor concentration, attention, judgment, and insight; and achieved IQ scores of  
 12 64, 66, and 68 respectively on the full scale, verbal, and performance portions of the WAIS - Third  
 13 Edition. [See AR at 12-14.] The ALJ further noted Dr. Donohue’s opinion that plaintiff was  
 14 capable of doing simple or detailed tasks slowly, but did not mention Dr. Donohue’s opinion that  
 15 plaintiff would need information repeated to her. [Id.] At step three of the sequential evaluation,  
 16 the ALJ expressly determined that plaintiff’s impairments did not meet or equal §§ 12.02 and 12.09  
 17 of the Listing. [AR at 12.] The ALJ did not, however, expressly consider whether plaintiff’s  
 18 impairments meet or equal § 12.05 of the Listing (and in particular § 12.05C), and the Court finds  
 19 that the ALJ’s failure to do so warrants remand.

20 Here, since the ALJ apparently credited Dr. Donohue’s findings [see AR at 15 (ALJ rejecting  
 21 a treating physician’s findings in favor of the “consulting/examining physicians”)], it appears that  
 22 plaintiff’s IQ scores assessed by Dr. Donohue (all of which are within the range of 60 to 70) satisfy  
 23 the requirement of § 12.05C that plaintiff have a valid verbal, performance, or full scale IQ score  
 24 of 60 through 70.

25 Next, it also appears that plaintiff’s other mental and physical impairments of asthma,  
 26 hepatitis C, depressive disorder, and history of polysubstance dependence, in remission (in  
 27 addition to her qualifying IQ scores and borderline intellectual functioning) may satisfy the  
 28 requirement of § 12.05C that plaintiff have other impairments imposing additional and significant

1 work-related limitations.<sup>4</sup> The regulations provide that in determining whether a claimant's  
 2 impairments satisfy the second prong of § 12.05C, "[the Commissioner] will assess the degree of  
 3 functional limitation the additional impairment(s) imposes to determine if it significantly limits [the  
 4 claimant's] physical or mental ability to do basic work activities, i.e., is a 'severe' impairment(s),  
 5 as defined in [20 C.F.R.] §§ 404.1520(c) and 416.920(c)." 20 C.F.R., Pt. 404, Subpt. P, App. 1,  
 6 § 12.00(A). 20 C.F.R. §§ 404.1520(c) and 416.920(c) define a "severe impairment" as "any  
 7 impairment **or combination of impairments** which significantly limits [a claimant's] physical or  
 8 mental ability to do basic work activities." See 20 C.F.R. §§ 404.1520(c), 416.920(c) (emphasis  
 9 added); see also 42 U.S.C. § 423(d)(2)(B) (requiring the Commissioner to "consider the combined  
 10 effect of all of the individual's impairments without regard to whether any such impairment, if  
 11 considered separately, would be of such severity"). The Ninth Circuit has held that an impairment  
 12 or combination of impairments "imposes a significant work-related limitation of function," according  
 13 to the second prong of § 12.05C, "when its effect on a claimant's ability to perform basic work  
 14 activities is more than slight or minimal." Fanning v. Bowen, 827 F.2d 631, 633 (9th Cir. 1987).  
 15 Here, the ALJ determined that plaintiff's impairments, when considered in combination, are severe  
 16 and result in a number of environmental and nonexertional limitations.<sup>5</sup> [See AR at 11-13, 15.]  
 17 As such, based on the ALJ's own findings, it appears that plaintiff's impairments may satisfy the  
 18 second prong of § 12.05C of the Listing because she has a severe combination of physical and  
 19 mental impairments that limit her ability to work in addition to her qualifying IQ scores. See Gomez  
 20 v. Astrue, 695 F.Supp.2d 1049, 1061-62 (C.D. Cal. 2010) (finding that plaintiff had "a physical or

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22       <sup>4</sup> Defendant argues that plaintiff has not shown that she has a physical or other mental  
 23 impairment imposing additional and significant work-related limitation or function, as required by  
 24 § 12.05C, because the ALJ determined that plaintiff's depressive disorder, by itself, was not  
 25 severe. [JS at 10; see AR at 12.] Defendant's argument lacks merit because, as explained  
 26 herein, the ALJ was required to consider the limiting effects from the combination of plaintiff's  
 27 impairments, rather than the effects of any one impairment considered in isolation. See 20 C.F.R.,  
 28 Pt. 404, Subpt. P, App. 1, § 12.00(A); 20 C.F.R. §§ 404.1520(c) and 416.920(c); 42 U.S.C. §  
 423(d)(2)(B).

5       <sup>5</sup> As discussed below, plaintiff argues that the ALJ erred in excluding additional work-related  
 28 limitations from the RFC determination.

1 other mental impairment imposing an additional and significant work-related limitation of function  
 2 within the meaning of section 12.05," where the ALJ determined that plaintiff had severe physical  
 3 and mental impairments in addition to his qualifying IQ scores) (internal quotation omitted); see  
 4 Hinkle v. Apfel, 132 F.3d 1349, 1352 (10th Cir. 1997) ("[T]he purpose of § 12.05C is to  
 5 compensate a claimant with an IQ in the 60-70 range and a limitation of function that affects his  
 6 work.") (quoting Sird v. Chater, 105 F.3d 401, 403 n.6 (8th Cir. 1997)).

7 Finally, although the Court agrees with defendant's contention that plaintiff has not  
 8 definitively established the preliminary requirements of § 12.05C (i.e., that plaintiff's "subaverage  
 9 general intellectual functioning with deficits in adaptive functioning initially manifested ... before  
 10 age 22" (20 C.F.R., Pt. 404, Subpt. P, App. 1, § 12.05)) [see JS at 10], the Court observes that  
 11 other courts have held that a valid qualifying IQ score obtained by a claimant after the age of 22  
 12 creates a rebuttable presumption that the claimant's mental impairment began prior to the age of  
 13 22, as it is presumed that IQ scores remain relatively constant during a person's lifetime. See  
 14 Jackson v. Astrue, 2008 WL 5210668, at \* 6 (C.D. Cal. Dec. 11, 2008); Campbell v. Astrue, 2011  
 15 WL 444783, at \*17 (E.D. Cal. Feb. 8, 2011) (adopting presumption that a valid IQ score of 69  
 16 obtained after the age of 22 "is evidence of impairment prior to the age of 22"); see also Hodges  
 17 v. Barnhart, 276 F.3d 1265, 1268 (11th Cir. 2001) ("courts have recognized [the] presumption ...  
 18 that IQ's remain fairly constant throughout life") (citing Muncy v. Apfel, 247 F.3d 728, 734 (8th Cir.  
 19 2001); Luckey v. U.S. Dept. of Health & Human Services, 890 F.2d 666, 668 (4th Cir. 1989)).  
 20 Accordingly, when a claimant presents an IQ score between 60 to 70 and an additional severe  
 21 mental or physical impairment, there is a rebuttable presumption that the claimant is disabled  
 22 under § 12.05C of the Listing. See Lowery v. Sullivan, 979 F.2d 835, 837 (11th Cir. 1992)  
 23 ("Generally, a claimant meets the criteria for presumptive disability under section 12.05(C) when  
 24 the claimant presents a valid I.Q. score of 60 to 70 inclusive, and evidence of an additional mental  
 25 or physical impairment that has more than 'minimal effect' on the claimant's ability to perform basic  
 26 work activities."). This presumption may be rebutted when an ALJ properly rejects the validity of  
 27 the claimant's IQ score. See id. The Court finds these cases persuasive and concludes that  
 28 remand is necessary for the ALJ to expressly determine whether the presumptions that plaintiff's

1 verbal, performance, and full scale IQ scores have remained constant throughout her life and that  
 2 she is disabled under § 12.05C of the Listing can be rebutted here.

3 Since the ALJ did not expressly reference §12.05 of the Listing and, in particular, did not  
 4 discuss all of the relevant evidence in the context of the requirements of Listing § 12.05C before  
 5 concluding that plaintiff does not meet or equal a listed impairment -- and it appears that plaintiff  
 6 might meet at least some of the requirements of § 12.05C -- the Court finds remand necessary  
 7 for the ALJ to properly consider whether plaintiff should be found disabled at step three of the  
 8 sequential analysis under this section of the Listing. See Lewis, 236 F.3d at 512; see also  
 9 Thresher v. Astrue, 283 Fed.Appx. 473, 475 (9th Cir. 2008) (remand warranted for the ALJ to  
 10 make further step three findings, where “the ALJ’s failure to reference § 12.05 and, in particular,  
 11 Listing 12.05C ma[de] it unclear whether the ALJ came to grips with the specific requirements of  
 12 that section when she issued her decision”) (citable for its persuasive value pursuant to Ninth  
 13 Circuit Rule 36-3).

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15 **B. THE ALJ’S RFC DETERMINATION AND VOCATIONAL EXPERT HYPOTHETICAL**

16 Plaintiff contends that the ALJ erred in reaching the RFC determination and posing a  
 17 hypothetical question to the vocational expert. [JS at 3-5, 11-16.] Specifically, plaintiff argues that  
 18 the ALJ erred in excluding from the RFC and the vocational expert’s hypothetical question Dr.  
 19 Donohue’s findings that plaintiff has poor insight and judgment, performs tasks slowly, and needs  
 20 instructions repeated to her, as the ALJ did not properly reject these portions of Dr. Donohue’s  
 21 opinion. [Id.] Although it appears, as explained above, that the ALJ credited the opinion of Dr.  
 22 Donohue [see AR at 15], plaintiff is correct that the ALJ did not include these portions of Dr.  
 23 Donohue’s findings concerning plaintiff’s limitations in either the RFC determination or the  
 24 hypothetical question that the ALJ posed to the vocational expert in response to which the  
 25 vocational expert testified that plaintiff could still work and upon which the ALJ relied in finding  
 26 plaintiff not disabled. [See AR at 13, 15, 17, 49-51.]

27 In determining plaintiff’s disability status, the ALJ had the responsibility to determine  
 28 plaintiff’s RFC after considering “all of the relevant medical and other evidence” in the record,

including all medical opinion evidence. 20 C.F.R. §§ 404.1545(a)(3), 404.1546(c), 416.945(a)(3), 416.946(c); see Social Security Ruling<sup>6</sup> 96-8p, 1996 WL 374184, at \*5, \*7. Similarly, “[t]he hypothetical an ALJ poses to a vocational expert, which derives from the RFC, ‘must set out *all* the limitations and restrictions of the particular claimant.’ Thus, an RFC that fails to take into account a claimant’s limitations is defective.” Valentine v. Comm’r Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009) (emphasis in original) (quoting Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988)).

In evaluating medical opinions, the case law and regulations distinguish among the opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining physicians). See 20 C.F.R. §§ 404.1502, 404.1527, 416.902, 416.927; see also Lester, 81 F.3d at 830. “[T]he Commissioner must provide ‘clear and convincing’ reasons for rejecting the uncontradicted opinion of an examining physician.” Lester, 81 F.3d at 830 (quoting Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990)). Even where an examining physician’s opinion is contradicted by another doctor, the ALJ must still provide specific and legitimate reasons supported by substantial evidence to properly reject it. Id. at 830-31 (citing Andrews 53 F.3d at 1043).

The Court agrees with plaintiff that the ALJ did not adequately address Dr. Donohue's findings in the RFC determination or the vocational expert's hypothetical. Even though the ALJ discussed some of Dr. Donohue's findings in the decision and appeared to credit her opinion over a treating physician's opinion, because the ALJ excluded from the RFC determination and vocational expert's hypothetical some of Dr. Donohue's specific findings (*i.e.*, that plaintiff has poor insight and judgment, performs tasks slowly, and needs instructions repeated to her), it appears that the ALJ implicitly rejected those portions of Dr. Donohue's opinion without providing any

<sup>6</sup> Social Security Rulings (“SSR”) do not have the force of law. Nevertheless, they “constitute Social Security Administration interpretations of the statute it administers and of its own regulations,” and are given deference “unless they are plainly erroneous or inconsistent with the Act or regulations.” *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 reason for doing so. This constitutes error. See 20 C.F.R. §§ 404.1527(f)(2), 416.927(f)(2); SSR  
 2 96-8p, at \*7 ("The RFC assessment must always consider and address medical source opinions.  
 3 If the RFC assessment conflicts with an opinion from a medical source, the adjudicator must  
 4 explain why the opinion was not adopted."). "Judicial review of an administrative decision is  
 5 impossible without an adequate explanation of that decision by the administrator." DeLoatche v.  
 6 Heckler, 715 F.2d 148, 150 (4th Cir. 1983) (finding that an ALJ's failure to explain why he  
 7 disregarded medical evidence prevented "meaningful judicial review"). The ALJ's failure to  
 8 expressly explain why he apparently rejected Dr. Donohue's findings as discussed above prevents  
 9 meaningful judicial review. "Since it is apparent that the ALJ cannot reject evidence for no reason  
 10 or the wrong reason, an explanation from the ALJ of the reason why probative evidence has been  
 11 rejected is required so that ... [the] [C]ourt can determine whether the reasons for rejection were  
 12 improper." Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981) (internal citation omitted).

13 Moreover, the Court concludes that the ALJ's exclusion of certain parts of Dr. Donohue's  
 14 findings from the RFC determination may have impacted the disability determination in this case.  
 15 Specifically, the ALJ presented a second hypothetical during the hearing that included additional  
 16 limitations that were similar to (although not precisely the same as) the additional limitations  
 17 assessed by Dr. Donohue that the ALJ excluded from the first hypothetical and the RFC  
 18 determination (*i.e.*, the second hypothetical included, among other limitations, the limitations that  
 19 plaintiff could only occasionally use independent judgment and occasionally needs supervision).  
 20 The vocational expert testified that plaintiff would be unable to work with the limitations outlined  
 21 in the second hypothetical. [See AR at 50.] Thus, it is possible that the vocational expert may  
 22 have found plaintiff unable to work with the additional limitations assessed by Dr. Donohue, but  
 23 which were excluded from the ALJ's RFC determination. Accordingly, if the ALJ determines on  
 24 remand that plaintiff does not meet or equal § 12.05C of the Listing (or any other listed  
 25 impairment), the ALJ is instructed to reconsider Dr. Donohue's opinion in reaching the RFC  
 26 determination and, if necessary, solicit additional vocational expert testimony.

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1 VI.  
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**REMAND FOR FURTHER PROCEEDINGS**

3 As a general rule, remand is warranted where additional administrative proceedings could  
4 remedy defects in the Commissioner's decision. See Harman, 211 F.3d at 1179; Kail v. Heckler,  
5 722 F.2d 1496, 1497 (9th Cir. 1984). In this case, remand is appropriate for the ALJ to properly  
6 consider if plaintiff's impairments meet or equal § 12.05C of the Listing, to reconsider Dr.  
7 Donohue's findings in reaching the RFC determination and, if necessary, to solicit additional  
8 vocational expert testimony. The ALJ is instructed to take whatever further action is deemed  
9 appropriate and consistent with this decision.

10 Accordingly, **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**;  
11 (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant  
12 for further proceedings consistent with this Memorandum Opinion.

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14 DATED: March 30, 2011

  
PAUL L. ABRAMS

15 UNITED STATES MAGISTRATE JUDGE

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